1971

The State of Utah v. Ersell Harris, Jr. : Brief of Appellant

Utah Supreme Court

Jack W. Kunkler; Attorney for Appellant

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

ERSELL HARRIS, JR.,
Defendant-Appe

BRIEF OF APPEL

Appeal from a verdict of guilty
District Court, in and for Salt La
Utah, the Honorable Merrill Faus

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

vs.

ERSELL HARRIS, JR.,
Defendant-Appellant.

Case No. 12424

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Ersell Harris, Jr., appeals from the finding of guilty of the crime of forgery and the sentence imposed upon him in the Third District Court, Salt Lake County, State of Utah, the Honorable Merrill Faux, presiding.

DISPOSITION IN THE LOWER COURT

On September 28 and 29, 1970, the appellant, Ersell Harris, Jr., following a denial by the court of a Motion to Dismiss, was tried by a jury and was found guilty of the offense charged. On October 13, 1970, the court sentenced Mr. Harris to serve the indeterminate term as provided by law for the crime of forgery.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction for the crime of forgery and an order releasing him from the custody of the Warden of the Utah State Prison.

STATEMENT OF FACTS

On September 17, 1969, the defendant in the case at bar stood trial in Criminal Case No. 20544 in Third District Court, the Honorable D. Frank Wilkins, presiding. The defendant was tried for a violation of §76-26-1, Utah Code Annotated, (1953) (R. 3, 48). The jury was impaneled (R. 4), State's Exhibit 1 was introduced (R. 10) (see Exhibit 1). It was a bank draft on Hyrum Hilton Plumbing and Heating, Inc. in the amount of $67.23 (see Exhibit 1). Mr. Arthur R. Reynolds tetsified that he was working at the Buy-Rite Market, No. 6, located at 376 South 8th West on July 22, 1967 (R. 9). At that time Mr. Reynolds approved the check marked State's Exhibit 1 for cashing (R. 10) and watched a fellow employee cash it (R. 11). After the defense rested, they made a motion to dismiss which was granted by the court (R. 75).

On September 28, 1970, the defendant stood trial in the case at bar, criminal information No. 22177 in Third District Court, the Honorable Merrill C. Faux, presiding. The defendant was tried for a violation of §77-26-1, Utah Code Annotated, (1953) (T. 5). The jury was impaneled (T. 51). The defense made a motion to the court to dismiss on the grounds of double jeopardy (T. 15, 51

The motion was denied (T. 51). The court clerk read the information to the jury (T. 51) and the court proceeded to try the case. Exhibit No. 2 was introduced (T. 56, see Exhibit 2), it was a bank draft on Hyrum Hilton Plumbing and Heating, Inc. in the amount of $67.23 (see Exhibit). Mr. Arthur R. Reynolds testified that he was working at the Buy-Rite Market, No. 6, located at 376 South 8th West (T. 58) on July 22, 1967 (T. 59). At that time Mr. Reynolds approved the check marked State's Exhibit No. 1 (T. 60) and watched the check cashed (T. 60).

ARGUMENT

POINT I.

DEFENDANT'S TRIAL PLACED HIM IN JEOPARDY TWICE AGAINST HIS RIGHTS AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION. HIS MOTION TO DISMISS WAS TIMELY MADE AND SHOULD HAVE BEEN GRANTED BY THE TRIAL COURT. DEFENDANT'S CONVICTION MUST THEREFORE BE OVERTURNED.

Benton v. *Maryland*, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), held the double jeopardy standard imposed by the Fifth Amendment to the United States Constitution applicable to state criminal prosecutions. In *Ashe* v. *Swenson*, 397 U. S. 437, 25 L. Ed. 2d 469

(1970), the Supreme Court held *Benton* v. *Maryland*, *supra*, retroactive and held the criteria to be that of "single act, occurence or episode, or transaction."

The State's chief exhibit in Criminal Case No. 20544 and the State's chief exhibit in Criminal Case No. 22177 are one in the same (see Exhibits). It is undeniable that the first trial on criminal information No. 20544 and the second trial on criminal information No. 22177 both involved the same single act, occurence, episode or transaction. In so far as the first trial was dismissed by the court after both the prosecution and defense had rested, jeopardy had attached under the decision in *State* v. *Whitman*, 93 Utah 557, 74 P. 2d 696 (1937).

In *Boykin* v. *Alabama*, 89 S. Ct. 1709, 395 U. S. 238, 23 L. Ed. 2d 274, the Supreme Court stated "the question of an effective waiver of a Federal Constitutional right in a proceeding is of course governed by federal standards."

As long ago as 1938, the Supreme Court held that courts must indulge every reasonable presumption against waiver of fundamental rights. *Johnson* v. *Zerbot*, 58 S. Ct. 1019, 304 U. S. 458, 82 L. Ed. 1461 (1938). In *Brady* v. *U. S.*, 397 U. S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), the Supreme Court went further in defining waiver requirements holding that "waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances and likely consequences*." (Emphasis added.)

In the case at bar there is no indication that defendant was aware of his right against being twice placed in jeopardy nor is there any indication that he knowingly, intelligently or voluntarily waived this right with sufficient awareness of the relevant circumstances and likely consequences.

In *Boykin, supra,* the Supreme Court in discussing the federal constitutional right against compulsory self incrimination, right to trial by jury, and right to confront one's accusers went on to state "We cannot presume a waiver of these important federal rights from a silent record."

To find waiver of the right to assert the defense of double jeopardy, the federal courts all held that the case must have at least proceeded to trial without presentation of the defense to the court. *United States* v. *American Honda Motor Co.*, 273 F. Supp. 810 (1967); *United States* v. *H. E. Komley Creamery, Inc.*, 232 F. Supp. 312 (1964); *United States* v. *Scotts,* 464 F. Rpt. 2d 832; *Barker* v. *Ohio,* 328 F. Rpt. 2d 582; *United States* v. *Bronomo,* 441 F. Rpt. 2d 922 (1971).

In so far as the record does not reflect a knowing, intelligent and voluntary waiver of defendant's federal constitutional right to not be placed twice in jeopardy and further does reveal an attempt by the defendant to present this defense in a form and at a time allowed within the federal standards his conviction should be reversed.

POINT II.

THE DEFENDANT WAS TRIED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AS GUARANTEED HIM UNDER ARTICLE 1, SECTION 12 OF THE UTAH STATE CONSTITUTION AND IN VIOLATION OF §77-24-13, UTAH CODE ANNOTATED, (1953) AND §77-1-10, UTAH CODE ANNOTATED, (1953). HIS CONVICTION MUST BE OVERTURNED NOT WITHSTANDING HIS FAILURE TO ENTER A PLEA OF ONCE IN JEOPARDY AT HIS ARRAIGNMENT ON THE CHARGE IN THE CASE AT BAR.

§77-24-13, Utah Code Annotated, (1953), states plainly that jeopardy "shall be a bar to another information."

§77-1-10, Utah Code Annotated, (1953), states plainly "nor shall any person be twice put in jeopardy." Article 2, Section 12 of the Utah State Constitution states plainly "nor shall any person be twice put in jeopardy for the some offense."

The only questions presented is whether or not the defendant forever waived his defense of former jeopardy by his failure to plead such at his subsequent arraignment. In *State* v. *Bohn*, 67 Utah 362, 248 P. 119 (1926). the Supreme Court of Utah stated that "the right to

plead former conviction or acquittal, or once in jeopardy, is waived, unless made at the time of entering the plea or at such other time as the court may permit." It must be noted that the *Bohn* case, supra, was decided over 45 years ago, the decision was based on precedent from almost 40 years before that and both the *Bohn* case and the precedent upon which it relied involved substantially different factual situations than the case at bar.

In the *Bohn* case, the defense was not presented to the court until time of appeal after the completion of trial and the rendering of a verdict. In the case at bar the defense, although not pleaded, was raised at the time set for trial and prior to reading of the information to the jury.

Oklahoma has a statute similar to §77-24-1, Utah Code Annotated, (1953), requiring entry of a plea of former jeopardy at arraignment. In its present form this statute is 22 O. S. 1971 §515. In *Mowels* v. *State*, 52 Okl. Ct. 193, 11 P. 2d 205 (1932), the Oklahoma Supreme Court held that failure to plead former jeopardy at time of arraignment waived the defense. Just this year the Oklahoma Supreme Court overruled this holding in *Wallace* v. *State*, Okl. Cr., (unavailable), 505 P. 2d 1334 (1973). The Court held that notwithstanding 22 O. S. 1971 §515, the defendant did not waive his right to the defense of former jeopardy where there was a positive showing on the record that he had unsuccessfuly presented the matter of former jeopardy to the trial court for consideration. It is urged upon this court that they reexamine

the question the case at bar presents, follow the modern trend and do as the Oklahoma Supreme Court and overrule the *Bohn* holding.

POINT III.

WHERE CASE LAW PERMITS WAIVER OF ENTRY OF PLEA AND THE COURT MINUTES DO NOT INDICATE FORMAL ENTRY OF PLEA, A MOTION TO DISMISS ON GROUNDS OF FORMER JEOPARDY MADE PRIOR TO READING OF THE INFORMATION TO THE JURY IS TANTAMOUNT TO THE ENTRY OF A PLEA OF FORMER JEOPARDY. IF THE DEFENSE IS GOOD, THE MOTION MUST BE GRANTED BY THE TRIAL COURT.

In *State* v. *Estes*, 52 Utah 572, 176 P. 271 (1918), the Supreme Court of Utah held that a defendant may waive the right to enter a formal plea before going to trial.

In the case at bar, the District Court transcript nowhere indicates that a formal arraignment was ever held or that the defendant ever entered a formal plea to the information. The only indication that a plea was ever entered is an unsigned and undated handwritten notation on the information (T. 5). The fact that the defendant's plea was never stated to the jury (T. 51) by the clerk as is clearly mandatory under subsection (1) of §77-31-1, Utah Code Annotated, (1953), as interpreted by our

Supreme Court in *State* v. *Telford*, 89 Utah 22, 56 P. 2d 1362 (1936), further buttresses the assertion that the defendant never availed himself of the opportunity to enter a formal plea. This being the case, defendant's motion to dismiss on the grounds of formal jeopardy, made to the court before the information was read to the jury, would be his first formal answer to the charges and as such constitutes a plea sufficient under §77-24-1, Utah Code Annotated, (1953). Hence defendant's motion deserved the trial court's consideration on the merits. On its merits defendant's motion of former jeopardy is clearly good. (see Argument, Point I.)

POINT IV.

IN SO FAR AS DEFENDANT'S COUNSEL DID NOT TIMELY RAISE AN OBVIOUS AND EFFECTIVE DEFENSE TO HIS CONVICTION, THE DEFENDANT WAS DENIED EFFECTIVE COUNSEL AND HIS CONVICTION MUST BE OVERTURNED.

In *Alires* v. *Turner*, 449 P. 2d 241 (1969), the Utah Supreme Court held a defendant entitled "to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law."

Conley v. *State*, 248 N. E. 2d 803 (1972), held that "the defense attorney bears the affirmative obligation

of informing the defendant of his constitutional rights, the existence of defenses, and the consequences of his plea."

In *People* v. *Cortz*, 91 Cal. Rptr. 6660 (1971), the court held that the defendant may attack ineffectiveness of counsel in connection with entry of plea as well as in connection with trial on merits. In *United States Ex Rel. Watson* v. *Mazurkiewicz*, 326 F. Supp. 622, (1971), the court stated: "It is part of a lawyer's obligation to prepare his client to enter a knowing, intelligent plea."

In the case at bar there is no indication that the defendant ever appeared with counsel and entered a plea. He did however have William J. Anderson as counsel up through July 14, 1970 (T. 12) and at the time of his trial was represented by John Russell. In any event where the defendant has an obvious defense that simply needs to be timely raised and the defense is not timely raised then he has had ineffective counsel under the *Alires* decision, ***supra.***

CONCLUSION

In the case at bar the defendant was made to stand trial in violation of the Fifth Amendment to the United States Constitution, Article I, Section 12 of the Utah State Constitution, and § 77-24-13 and § 77-1-10, Utah Code Annotated, (1953). The defendant raised his defense of former jeopardy at the time set for his second trial after the jury was impaneled but before the infor-

mation was read to them. This is timely raising of the defense within federal standards and modern state standards. Defendant's motion to dismiss should have been granted and the case dismissed. Therefore, his conviction must be reversed.

Respectfully submitted,

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Attorney for Appellant